

IN THE SUPREME COURT OF OHIO

RITE AID OF OHIO, INC., et al., :
Appellees, : Case No. 2014-0828
v. : Appeal from Ohio Board of Tax Appeals
WASHINGTON COUNTY AUDITOR : BTA Case No. 2011-1760
and WASHINGTON COUNTY BOARD
OF REVISION, :
Appellants. :

**REPLY BRIEF OF APPELLANTS WASHINGTON COUNTY AUDITOR AND
WASHINGTON COUNTY BOARD OF REVISION**

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Meijer, Inc. v. Montgomery Cty. Bd. of Revision,
BTA Nos. 93-M-731, 1995 Ohio Tax LEXIS 249 (Feb. 8, 1995).....2

Meijer Stores Ltd. Partnership v. Franklin Cty. Bd. of Revision,
122 Ohio St. 3d 447, 2009-Ohio-3479, 912 N.E.2d 560 *infra*

LAW AND ARGUMENT

In its Brief, Appellee Rite Aid of Ohio, Inc. (“Rite Aid”) alleges that the Court’s decision in *Meijer Stores Limited Partnership v. Franklin County Board of Revision*, 122 Ohio St. 3d 447, 2009-Ohio-3479, 912 N.E.2d 560, does not apply to the resolution of this appeal for two primary reasons the County Appellants construe as follows: (1) the Rite Aid store at issue (the “Subject Property”) is not a “special purpose” property; and (2) Rite Aid is not *required* to lease its property for rents above the market rent for local retail property. Rite Aid misunderstands *Meijer* and it is fully applicable here. The Subject Property is a first-generation build-to-suit property occupied by Rite Aid as of the lien date and for the foreseeable future, and the Court is unequivocally authorized to consider the value of the property to Rite Aid itself.

Reply Proposition of Law No. 1:

The “special purpose” exception in *Meijer* applies.

Rite Aid alleges that the Subject Property is a general retail property and cannot constitute a special purpose property under *Meijer*. Although not directly stated, Rite Aid presumably contends that Ms. Blosser’s appraisal (the “Blosser Report”) constitutes a constitutionally prohibited value-in-use appraisal. Rite Aid’s analysis of *Meijer* misses the mark. The Court’s discussion of *Higbee Co. v. Cuyahoga Cty. Bd. of Revision*, 107 Ohio St. 3d 325, 2006-Ohio-2, 839 N.E.2d 385, in *Meijer* is particularly instructive in resolving Rite Aid’s misconception. The Court distinguished *Higbee* to the build-to-suit *Meijer* at issue in noting that “*Higbee* did not involve a situation in which the improvement of the property enhanced its utility to the business that occupied the property *while not greatly increasing its marketability.*” *Meijer*, at ¶ 27, *citing Higbee, supra* (emphasis added). Similarly, there was no evidence in *Higbee* “that

special adaptation of the property had reduced its value in the eyes of potential purchasers.” *Id.* Accordingly, “the present use of a property may be considered when a ‘building in good condition [is] being used currently and for the foreseeable future for the unique purpose for which it was built’, otherwise, ‘the owner of a distinctive, but yet highly useful, building [would be able] to escape full property tax liability.” *Meijer*, at ¶ 25, citing *Dinner Bell Meats, Inc. v. Cuyahoga Cty. Bd. of Revision*, 12 Ohio St. 3d 270, 466 N.E.2d 909 (1984). In purchasing the land and constructing build-to-suit improvements, the owner “evidences a market need” for such property and consideration of the land and construction costs is wholly appropriate since a prospective purchaser “was willing to pay at least the costs of the property as newly constructed.” *Id.* at ¶ 26, citing *Meijer, Inc. v. Montgomery Cty. Bd. of Revision*, BTA Nos. 93-M-731, 732 and 733, 1995 Ohio Tax LEXIS 249 (Feb. 8, 1995), unreported.

The Subject Property is a build-to-suit retail store just like Meijer. *See Blosser Report* at p. II-12 (“[t]his is a prototype drug store developed specifically for the occupant: Rite Aid”). Mr. Hatcher testified that the three national drugstores prefer to build their own properties and will not ordinarily occupy another’s build-to-suit store if the occupant for which the property was built abandons the store.¹ *See* BTA Hearing Record (“H.R”) at p. 36:7-22. Mr. Hatcher’s appraisal (the “Hatcher Report”) utilizes the same approach as Meijer’s appraiser and similar conclusions can be drawn regarding alleged obsolescence upon vacation by the original user. Mr. Hatcher’s second-generation sales of general retail stores reveal that its build-to-suit adaptation for Rite Aid does *not* greater increase its marketability and value if Rite Aid vacates.

¹ The County Appellants are not arguing that the Subject Property is a special purpose property because it sells pharmaceuticals, but rather a “mini-big box” as similar to the traditional big boxes, the three national drugstores construct build-to-suit “prototype” stores that vary little in different locations across the country, as do the traditional big boxes.

Hatcher Report at pp. 30-33. Yet Ms. Blosser's Rite Aid rent comparables based upon construction costs reveal that Rite Aid itself is willing to pay far greater than a second-generation user to construct and occupy the property. Blosser Report at p. III-11. This is exactly the type of situation that *Meijer* envisions and reflects the inherent value to Rite Aid. Both appraisers agree that the Subject Property is a build-to-suit Rite Aid and with an ordinary lease term of at least 20 years, Rite Aid was likely to be the occupant for this less than 11-year old property as of the lien date. BTA H.R. at p. 46:7-25, 47, 48:1-3; 70:13-25, 71:1-10. It is therefore appropriate to consider that a "potential purchaser" would be willing to pay at least the costs to construct the store. *Meijer*, at ¶ 26. As such, the special purpose doctrine in *Meijer* fully applies here and Mr. Hatcher improperly ignored all first-generation data in an attempt to reduce Rite Aid's full tax liability. *Id.* at ¶ 25.

REPLY PROPOSITION OF LAW NO. 2

***Meijer* authorizes consideration of the rent that Rite Aid itself is willing to pay.**

Next, Rite Aid alleges that the County Appellants reliance on *Meijer* is misplaced since Ohio law does not *require* Rite Aid to lease the property for at least the amount it is willing to pay for its construction through a build-to-suit lease. Again, Rite Aid is misguided and the Court already rejected this argument in *Meijer*. The conclusions of the board of education's appraiser in *Meijer* are similar – if not identical – to those drawn by Ms. Blosser when selecting a market rent for the Subject Property. In selecting a market rent for *Meijer*, the board of education's appraiser emphasized "that second-generation rents will never adequately reflect market rent" for the first-generation occupant who built the property for itself:

When asked, in the context of his income approach, who would lease the space,

Koon [the board of education's appraiser] answered: Meijer. Accordingly, 'market rent' for Koon consisted in part as what rent Meijer itself would be willing to pay to an owner other than itself.

'[T]he fact that the subject facility continues to operate under the auspice of its first generation user indicates that it possesses certain attributes which make it inherently more desirable than second-generation space.'

Meijer, at ¶¶ 8, 11. In rejecting Meijer's contention that its owner-occupied property could not be compared to build-to-suit properties, the Court held that since sales should not be adjusted to reflect economic encumbrances, and more specifically, the effect of above-market rent paid by a creditworthy tenant, an appraiser valuing Meijer "may take into account the possibility that at some point, the store could be held as a rental property subject to an above-market lease that would enhance its value." *Id.* at ¶ 23.

Ms. Blosser directly follows *Meijer* in appraising the Subject Property. As she repeatedly emphasized in her testimony before the BTA, she felt it was appropriate to consider the purpose for which the property was built and would continue to be used in the foreseeable future since Rite Aid would be only approximately half-way through its initial lease if the property was not owned by Rite Aid. *See* BTA H.R. at p. 72:19-25; 75:5-11; 87:2-25, 88:1-20; 91:17-21. Like Mr. Koon in *Meijer*, Ms. Blosser testified that its "gone dark" value will never reflect the value to Rite Aid while it is using the property:

Again to me, if you went to Rite Aid today and said I want to buy your building for 'x' amount, they're not going to sell it for a million dollars because they are using it and its functional and, you know, they need that real estate and its going to be worth more as of that date because they are using it.

Now, certainly, if Rite Aid suddenly goes out of business and we're sitting there with an empty building, you've got a different story. Again, what was it as of the date of value? It was being used for its intended use. What would a buyer – you know, market value is willing buyer and willing seller. You have to have both.

Now, you might have a builder that says I'll pay you a million dollars for that, but if it's being used for its intended use, the seller is not going to sell it for that, uh, and that's what you are trying to balance within an appraisal is market value. Willing buyer, willing seller. Not dysfunctional, not distressed. So that's what we tried to present.

BTA H.R. at p. 128:14-25, 129:1-11. And in accordance with *Meijer*, Ms. Blosser was completely authorized to consider the value of the property to Rite Aid itself and in arriving at market rent, consider the amount of rent that Rite Aid would be willing to pay if it was not the owner. *Meijer*, at ¶¶ 8, 23.

As Rite Aid readily admits in its Brief, Mr. Hatcher valued the property at its "local market value" as if Rite Aid was not the occupant. Since "local market value" is not synonymous with "true value in money"² here, and expressly precludes consideration of value to Rite Aid itself, Mr. Hatcher's report cannot constitute competent and probative evidence of value upon which the Court can rely. Accordingly, the Court should reverse the BTA's decision and accept the Blosser Report which fully complies with the Court's unambiguous direction in *Meijer*.

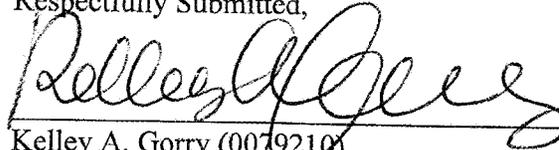
CONCLUSION

For the reasons set forth herein, and in its original Merit Brief, the BTA's decision constitutes an abuse of discretion and must be reversed. Rite Aid has not presented any evidence to enable the Court to conclude that the BTA's decision was reasonable or lawful when it adopted an appraisal report that violates *Meijer*. As such, the County Appellants respectfully request that the Court reverse the BTA's decision and direct it to value the Subject Property in

² In arriving at a property's "true value in money", an auditor is explicitly permitted to consider "its adaptation and availability for the purpose for which it was acquired or constructed or for the purpose for which it is or may be used." O.A.C. 5703-25-06(A).

accordance with the Blosser Report, or in the alternative, remand this matter to the BTA with instruction to consider the data set forth in the Blosser Report and independently determine value.

Respectfully Submitted,



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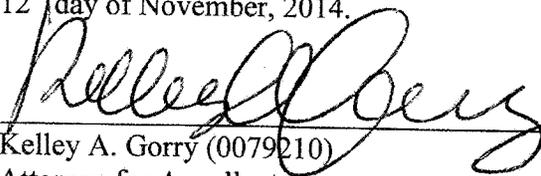
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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Merit Brief was served, by regular U.S. Mail, postage prepaid, upon: Stephen Swaim, Esq., Attorney at Law, 600 S. High St., Columbus, OH 43215; and the Honorable Michael DeWine, Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, OH 43215, this 12th day of November, 2014.



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APPENDIX

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Administrative Code:

O.A.C. 5703-25-063

5703-25-06 Equalization procedures.

(A) "True value in money" shall be determined, in the first instance, by the county auditor as the assessor of real property in the county on consideration of all facts tending to indicate the current or fair market value of the fee simple estate, as if unencumbered of property including, but not limited to, the physical nature and construction of the property, its adaptation and availability for the purpose for which it was acquired or constructed or for the purpose for which it is or may be used, its actual cost, the method and terms of financing its acquisition, its value as indicated by reproduction cost less physical depreciation and all forms of obsolescence if any, its replacement cost, and its rental income-producing capacity, if any. The auditor shall likewise take into consideration the location of the property and the fair market value of similar properties in the same locality.

(B) At least once each six-year period the county auditor of each county, in conformity with the provisions of section 5713.01 of the Revised Code, shall view and appraise each parcel of real property and the improvements thereon in the county and this appraisal shall reflect the one hundred per cent true value in money of each parcel appraised, and the auditor shall place each parcel of real property on the tax duplicate at its "taxable value" which is thirty-five per cent of its true value in money.

(C) In the update year the county auditor shall determine whether each parcel of real property and the improvements thereon is appraised at its true value in money, as defined in paragraph (A) of rule 5705-25-05 of the Administrative Code, as of tax lien date of said year. If the auditor finds that there has been either an increase or decrease in value, the auditor shall adjust the tax records to show the true value in money of each parcel and the improvements thereon as well as the "taxable value" thereof, which "taxable value" shall be thirty-five per cent of the true value in money thereof as redetermined by the county auditor as of tax lien date.

(D) In making this triennial update of the true value in money and the "taxable value" of each parcel of real property, the county auditor shall be guided by sales of comparable property for a like use; the sales ratio and other related studies compiled by the tax commissioner for the three calendar years immediately preceding the update year; by the increase or decrease in current building costs and changes in construction technique both after the proper application of depreciation and obsolescence; by the increase or decrease in the net rental income, expenses, and services for comparable property since the year in which the preceding sexennial reappraisal had been completed; and such other indications of increase or decrease in value as may be pertinent, such as test or sample appraisals on a current basis, where sales of real property are limited or in question.

(E) In implementing any increase or decrease in valuation of real property pursuant to this rule or ordered by the tax commissioner pursuant to section 5715.24 of the Revised Code, the county auditor shall, when practicable, increase or decrease the taxable valuation of parcels in accordance with actual changes in valuation of real property which occur in different subdivisions, neighborhoods, or among classes of real property in the county. The auditor may increase or decrease the true or taxable value of any lot or parcel of real estate in any township, municipal corporation, or other taxing district by an amount which will cause all real property on the tax list to be valued as required by law, or the auditor may increase or decrease the aggregate value of all real property, or any class of real property, in the county, township, municipal corporation, or other taxing district, or in any ward or other division of a municipal corporation by a per cent or amount which will cause all property to be properly valued and assessed for taxation in accordance with section 36, Article II and section 2, Article XII, Ohio Constitution, and sections 5713.03 and 5715.01 of the Revised Code, and this rule.

(F) In determining the true value in the year of the sexennial reappraisal or update year of any tract, lot, or parcel of real estate if such tract, lot or parcel has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor may consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes. However, the sale price in an arm's length transaction between a willing seller and a willing buyer shall not be considered the true value of the property sold if subsequent to the sale:

- (1) The tract, lot, or parcel of real estate loses value due to some casualty;
- (2) An improvement is added to the property.

(G) The lien for taxes attaches to all real property on the first day of January. If a building, structure, fixture or other improvement to land is under construction on January first of any year, its valuation shall be based upon its value or percentage of completion as it existed on January first.

(H) When the county auditor revalues real property, notifications of the change in value shall be made as provided in section 5713.01 of the Revised Code.

Effective: 10/09/2014

Five Year Review (FYR) Dates: 07/25/2014 and 10/09/2019

Promulgated Under: 5703.14

Statutory Authority: 5703.05

Rule Amplifies: 5713.01 , 5715.01

Prior Effective Dates: 12/28/73, 11/1/77, 9/18/03